

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

10 PACIFIC COAST FEDERATION OF  
11 FISHERMEN'S ASSOCIATIONS, *et al.*,

12 Plaintiff,

13 v.

14 GINA RAIMONDO, *et al.*,

15 Defendants.

16 No. 1:20-cv-00431-DAD-EPG

17 ORDER DENYING WITHOUT  
PREJUDICE MOTION FOR LEAVE TO  
AMEND ANSWER

18 (Doc. No. 311)

19 THE CALIFORNIA NATURAL  
20 RESOURCES AGENCY, *et al.*,

21 Plaintiffs,

22 v.

23 GINA RAIMONDO, *et al.*,

24 Defendants.

25 No. 1:20-cv-00426-DAD-EPG

26 ORDER DENYING WITHOUT  
PREJUDICE MOTION FOR LEAVE TO  
AMEND ANSWER

27 (Doc. No. 215)

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## INTRODUCTION

2 Plaintiffs<sup>1</sup> in the above-captioned actions bring closely related claims against the National  
3 Marine Fisheries Service (“NMFS”), the U.S. Fish and Wildlife Service (“FWS”), the U.S.  
4 Bureau of Reclamation (“Reclamation”), and various official representatives of those agencies  
5 (collectively, “Federal Defendants”). (CNRA, Doc. No. 51; PCFFA, Doc. No. 52.<sup>2</sup>) Both cases  
6 involve challenges to the adoption by NMFS and FWS, respectively, of a pair of “biological  
7 opinions” issued in 2019 pursuant to the Endangered Species Act (“ESA”), 16 U.S.C § 1531 *et*  
8 *seq.* Those biological opinions address the impact of Reclamation’s updated plan for the long-  
9 term operation of the Central Valley Project (“CVP”) and the State Water Project (“SWP”) (the  
10 “Proposed Action”) on various ESA-listed species.

11 These cases were stayed for some time to allow Federal Defendants to reinitiate  
12 consultation under Section 7 of the ESA regarding the challenged biological opinions and to  
13 allow federal and state regulators to engage in a process designed to “reconcile” the Proposed  
14 Action as evaluated in the challenged biological opinions with parallel species protection  
15 measures imposed by state regulators. (See Doc. No. 285.) Federal Defendants formally  
16 reinitiated consultation on the challenged biological opinions on September 30, 2021. (Doc. No.  
17 293.)

18       Federal Defendants and the State Plaintiffs reached agreement in the context of the *CNRA*  
19 case as to how the CVP and SWP should be operated through September 30, 2022 while  
20 reinitiated consultation is ongoing. (Doc. No. 296 at 2.) That agreement was initially described  
21 in a five-page, proposed “Interim Operations Plan” (“IOP”) attached to a joint status report  
22 submitted to this court on October 14, 2021. (Doc. No. 296-1.) The proposal has been refined  
23 somewhat in recent weeks, with the current IOP set forth in the form of a proposed order lodged

<sup>24</sup> <sup>1</sup> Plaintiffs in *Pac. Coast Fed'n of Fishermen's Ass 'ns v. Raimondo*, 1:20-cv-00431-DAD-EPG (PCFFA), are a coalition of six environmental organizations (collectively referenced herein as "PCFFA"). Plaintiffs in *Cal. Nat. Res. Agency v. Raimondo*, No. 1:20-cv-00426-DAD-EPG (CNRA), are the People of the State of California, California's Natural Resources Agency, and California's Environmental Protection Agency ("State Plaintiffs").

<sup>28</sup> <sup>2</sup> Hereinafter, unless otherwise noted, the docket references in this order are to the docket numbers in *PCFFA*.

1 with the court. (Doc. No. 313-1.) Federal Defendants have moved in both related cases for  
2 voluntary remand without vacatur of the 2019 biological opinions, and further request that the  
3 court impose the IOP as a form of interim injunctive relief. (Doc. No. 313.) If this request were  
4 to be granted, the 2019 biological opinions would remain in place, but as modified by the IOP.  
5 (*Id.*) State plaintiffs in *CNRA* join in the Federal Defendants' motion. (*CNRA*, Doc. No. 220.)  
6 Plaintiffs in the *PCFFA* case intend to file a motion seeking additional forms of injunctive relief,  
7 since it is their position that the IOP is not sufficiently protective of the ESA-listed species at  
8 issue. (Doc. Nos. 296 at 3–4; 307.) Defendant intervenors indicate that they intend to oppose any  
9 form of relief that would operate to modify the operational parameters set forth in the challenged  
10 biological opinions. (Doc. Nos. 296 at 7–18; 307.) The court has set an aggressive briefing  
11 schedule, particularly given the complexity of the issues raised, to ensure that the motions  
12 pertaining to remand and to the nature and scope of interim injunctive relief will be ripe in  
13 January 2022. (Doc. No. 315.)

14 Meanwhile, one set of defendant-intervenors, the State Water Contractors (“SWC”)<sup>3</sup>, has  
15 moved to amend its answer in each of the related cases (Doc. No. 311; *CNRA* Doc. No. 215) to  
16 add the following three proposed cross-claims against Federal Defendants:

17 (1) that Reclamation violated the Administrative Procedure Act (“APA”), 5 U.S.C.  
18 §§ 701–06, and the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 *et*  
19 *seq.*, by “*approv[ing]*” the IOP without subjecting the IOP to appropriate environmental  
20 review;  
21 (2) that all Federal Defendants violated the APA and ESA § 7(a)(2), 16 U.S.C.  
22 § 1536(a)(2), by “*approv[ing]*” the IOP without engaging in appropriate consultation to  
23 ensure that the operational changes embodied in the IOP will not jeopardize the continued  
24 existence of ESA-listed species and/or adversely modify their critical habitat; and

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26 <sup>3</sup> SWC alleges that it is a non-profit corporation consisting of 27 public water agencies that  
27 provide water to 27 million Californians and 750,000 acres of farmland. (Doc. No. 311-2 at 33.)  
28 SWC's members include the Metropolitan Water District of Southern California, Kern County  
Water Agency, Central Coast Water Agency, and Solano County Water Agency. (See Doc. No.  
63-4 at 2.)

1 (3) that all Federal Defendants violated the APA and Section 4004 of the Water  
2 Infrastructure Improvements for the Nation (“WIIN”) Act, Pub. L. No. 114-322 (2016), by  
3 failing to abide by certain procedures applicable to ESA consultation related to the CVP  
4 and SWP.

5 (See Doc. No. 311-2 (SWC’s proposed first amended answer).) In conjunction with the motions  
6 to amend, SWC has proposed the filing of a motion for summary judgment addressing their cross-  
7 claims on December 16, 2021, with the apparent intent to merge that briefing with the schedule  
8 the court has set regarding the motion for remand without vacatur and related requests for interim  
9 injunctive relief.

10 Federal Defendants oppose SWC’s motions to amend (Doc. No. 318, *CNRA* Doc. No.  
11 227), and are joined in opposition by the *PCFFA* plaintiffs (Doc. No. 318) and *CNRA* plaintiffs  
12 (*CNRA* Doc. No. 229). Considering the need for an expedited ruling, the court did not authorize  
13 the filing of reply briefs. Having carefully considered the motions and oppositions in the context  
14 of the entire record, the court will deny the motions to amend without prejudice.

## 15 ANALYSIS

16 A motion to amend a pleading is governed by Federal Rule of Civil Procedure 15, which  
17 provides that the court should grant leave “freely . . . when justice so requires.” Fed. R. Civ. P.  
18 15(a)(2). Courts should consider several factors weighing against granting leave to amend,  
19 including “undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to  
20 cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by  
21 virtue of allowance of the amendment [and] futility of the amendment[.]” *Foman v. Davis*, 371  
22 US 178, 182 (1962). “Of the *Foman* factors, prejudice to the opposing party carries the most  
23 weight.” *Brown v. Stored Value Cards, Inc.*, 953 F.3d 567, 574 (9th Cir. 2020) (citing *Eminence*  
24 *Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003)). “Absent prejudice, or a  
25 strong showing of any of the remaining *Foman* factors, there exists a presumption under Rule  
26 15(a) in favor of granting leave to amend.” *Eminence*, 316 F.3d at 1052. Here, the court  
27 discusses only the question of futility in detail because the strength of the showing as to that  
28 factor alone justifies denial of amendment here. *See Nunes v. Ashcroft*, 375 F.3d 805, 808 (9th

1 Cir. 2004) (“Futility alone can justify the denial of a motion for leave to amend.”).

2 The first proposed cross-claim is premised upon the allegation that Federal Defendants’  
3 “approval” of the IOP violated NEPA because Federal Defendants failed to subject the IOP to the  
4 environmental review NEPA requires. Because NEPA does not provide a private right of action,  
5 the court’s jurisdiction to hear NEPA claims arises under the APA. *Friends of Roeding Park v.*  
6 *City of Fresno*, 848 F. Supp. 2d 1152, 1160 (E.D. Cal. 2012) (“It is well-accepted that . . . NEPA .  
7 . . do[es] not create [a] private right[] of action to enforce [its] provisions . . . Plaintiff seeking  
8 relief for violations of these statutes must rely upon other authority, such as the [APA].”). The  
9 APA in turn includes “a series of procedural requirements litigants must fulfill before bringing  
10 suit in federal court.” *San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1093 (9th Cir.  
11 2005).

12 The APA authorizes suit by “[a] person suffering legal wrong because of agency action, or  
13 adversely affected or aggrieved by agency action within the meaning of a relevant statute.”  
14 5 U.S.C. § 702.; *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 61 (2004). Where no other  
15 statute provides a private right of action, the “agency action” complained of must be “final  
16 agency action.” 5 U.S.C. § 704; *Norton*, 542 U.S. at 62. Agency action” is defined in 5 U.S.C.  
17 § 551(13) to include “the whole or a part of an agency rule, order, license, sanction, relief, or the  
18 equivalent or denial thereof, or failure to act.” An “agency action” falls under one of “five  
19 categories of decisions made or outcomes implemented by an agency-‘agency rule, order, license,  
20 sanction [or] relief.’” *Norton*, 542 U.S. at 62 (quoting 5 U.S.C. § 551(13)). As the Supreme  
21 Court explained in *Norton*:

22 All of those categories involve circumscribed, discrete agency  
23 actions, as their definitions make clear:

- 24 1. “[a rule is] an agency statement of . . . future effect designed to  
implement, interpret, or prescribe law or policy;
- 25 2. [an order is] a final disposition . . . in a matter other than rule  
making;
- 26 3. [a license is] a permit . . . or other form of permission;
- 27 4. [a sanction is] a prohibition . . . or taking [of] other compulsory  
or restrictive action; and

1                   5. [a relief is] (a) a grant of money, assistance, license, authority,  
2                   etc., or (b) recognition of a claim, right, immunity, etc ., or (c) a  
3                   taking of other action on the application or petition of, and  
4                   beneficial to, a person.”

4                   *Norton*, 542 U.S. at 62 (quoting 5 U.S.C. §§ 551(4), (6), (8), (10), (11)).

5                   For an action to be “final agency action” under the APA, two conditions must be met:

6                   1. The action must mark the ‘consummation’ of the agency’s  
7                   decision making process and must not be of a merely tentative or  
8                   interlocutory nature, and  
9                   2. The action must be (a) “one by which rights or obligations have  
10                   been determined,” or (b) “from which legal consequences flow.”

10                   *Bennett v. Spear*, 520 U.S. 154, 178 (1997). Whether an action constitutes a final agency action  
11                   is premised on the observation that the action has “no direct consequences” and serves “more like  
12                   a tentative recommendation than a final binding determination.” *Id.* In other words, if the agency  
13                   action is purely advisory and in no way affects the legal rights of the relevant actors it is not a  
14                   “final agency action” under the APA. *Id.* In the Ninth Circuit, the core question is whether the  
15                   agency has completed its decision-making process and whether the result of that process is one  
16                   that will directly affect the parties. *Oregon Nat. Desert Ass’n v. U.S. Forest Serv.*, 465 F.3d 977,  
17                   982 (9th Cir. 2006). There are at least three circumstances in which an agency’s action may be  
18                   deemed final:

19                   1. If the action “amounts to a definitive statement of the agency’s  
20                   position” or  
21                   2. If the action “has a direct and immediate effect on the day-to-day  
22                   operations” of the subject party, or  
23                   3. If, based on the action, “immediate compliance with the terms is  
24                   expected.”

24                   *Id.* A reviewing court should “focus on the practical and legal effects of the agency action” and  
25                   should interpret the finality requirement “in a pragmatic and flexible manner.” *Id.*

26                   Here, nothing in the proposed amended answer or elsewhere in the record suggests that  
27                   any Federal Defendant has taken any “final agency action” in connection with the IOP. Relevant  
28                   to this issue of finality, SWC’s proposed amended answer alleges as follows:

1 On September 27, 2021, counsel for Federal Defendants provided  
2 SWC with the IOP (the proposed “interim operations plan” for  
Water Year 2022). . . .

3 FWS and NMFS were involved in the development of the IOP. . . .

4 [An] October 1, 2021 Joint Status Report [filed] in PCFFA and  
5 CNRA . . . stated that as part of the reconciliation process  
described in Federal Defendants’ prior filings, Federal Defendants  
6 and the State Plaintiffs developed a plan of operations of the CVP  
and SWP through September 30, 2022. . . .

7 Federal Defendants’ position statement in [an October 14, 2021]  
8 Joint Status Report stated Federal Defendants and State Plaintiffs  
agree that “adoption of the [IOP] is necessary,” and that Federal  
Defendants would file a motion to adopt the IOP and to stay the  
9 litigation through September 30, 2022 in both cases. . . .

10 On November 4, 2021, Federal Defendants indicated in a Joint  
11 Status Report that they were considering making “targeted  
adjustments to the interim operations plan submitted on October 14,  
2021,” but confirmed that they would seek the Court’s approval of  
12 a specifically identified plan for interim operations on November  
23, 2021. (*Id.* at ¶ 73.)  
13

14 (Doc. No. 311-2, ¶¶ 58, 60, 63, 66, 73 (emphasis added).)

15 These allegations confirm that whatever Federal Defendants have thus far done in  
16 connection with the IOP, that conduct likely does not amount to “agency action” at all, and  
17 certainly is not “final agency action.” The IOP is a *proposed* management regime being  
18 presented to the court for the court’s consideration. Nothing suggests that the IOP is “the whole  
19 or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or  
20 failure to act,” 5 U.S.C. § 551(13)), as those terms are defined in the statute, *Norton*, 542 U.S. at  
21 62 (quoting 5 U.S.C. §§ 551(4), (6), (8), (10), (11)).

22 Even assuming, *arguendo*, that the Federal Defendants’ alleged conduct in connection  
23 with the IOP could be considered an “agency action,” and further assuming that the IOP marks  
24 the “consummation” of that hypothetical agency action (thereby satisfying the first finality  
25 requirement set forth in *Bennett*), the second finality requirement—that the action must be “one  
26 by which rights or obligations have been determined,” or “from which legal consequences

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1 flow”—plainly is not alleged, nor could it be.<sup>4</sup> To the contrary, SWC’s proposed amended  
 2 answer confirms that the IOP is in the process of being presented to the court for *possible* judicial  
 3 approval as part of a motion for interim injunctive relief. For these reasons, the first cross-claim  
 4 premised upon NEPA fails to allege final agency action as required by the APA and therefore  
 5 amendment to assert such a claim would be futile as presently formulated.

6         The same is true as to the second cross-claim. That claim alleges that Federal Defendants  
 7 violated the APA and ESA § 7(a)(2) by “approv[ing]” the IOP without engaging in appropriate  
 8 consultation required under the ESA. First, to the extent SWC is attempting to bring this claim  
 9 directly under the ESA’s citizen suit provision, they have failed to provide the statutorily required  
 10 sixty-day notice to Federal Defendants. 16 U.S.C. § 1540(g)(2)(A)(i) (“No action may be  
 11 commenced [under the ESA’s citizen suit provision] prior to sixty days after written notice of the  
 12 violation has been given to the Secretary, and to any alleged violator. . . .”); *Klamath-Siskiyou*  
 13 *Wildlands Ctr. v. MacWhorter*, 797 F.3d 645, 647 (9th Cir. 2015) (“A failure to strictly comply  
 14 with the notice requirement acts as an absolute bar to bringing suit under the ESA.”). To the  
 15 extent SWC is attempting to bring this claim under the APA, the final agency action requirement  
 16 again applies. The second cross-claim relies on the same general allegations as the first and again  
 17 fails to articulate a final agency action. Amendment to assert such a cross-claim would therefore  
 18 be futile as presently proposed.

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21 <sup>4</sup> In *Oregon Natural Desert* the Ninth Circuit did articulate that a final agency action can exist  
 22 where an action “amounts to a definitive statement of the agency’s position.” 465 F.3d at 982.  
 23 Superficially, it is possible to apply that language to the present circumstances insofar as Federal  
 24 Defendants appear to have settled on a version of the IOP for presentation to the court thereby  
 25 taking a position in this litigation that the IOP is the best form of injunctive relief. But that is not  
 26 the kind of situation that the court in *Oregon Natural Desert* had in mind. There, the Forest  
 27 Service argued that its issuance of Annual Operating Instructions (“AOIs”) to grazing permit  
 28 holders was not an agency action or final for purposes of the APA. *Id.* The Ninth Circuit first  
 held that an AOI was the equivalent of a license. *Id.* at 982–83. Then, more pertinent here, it  
 concluded that the issuance of the AOIs was a final agency action because “the initial agency  
 decisionmaker arrived at a definitive position and put the decision into effect.” *Id.* at 985  
 (emphasis added). The latter step—putting the decision into effect—is not alleged here. SWC’s  
 entirely conclusory assertion that Reclamation “approved” the IOP (see, e.g., Doc. No. 311-2,  
 ¶ 87) is insufficient to satisfy that requirement.

1           The third cross-claim arguably requires some additional discussion. That claim alleges  
2 that Federal Defendants violated the APA and the WIIN Act, by failing to abide by procedures set  
3 forth in WIIN Act § 4004. In pertinent part, § 4004(a) provides:

4           Federal agencies shall cooperate with State and local agencies to  
5 resolve water resource issues in concert with conservation of  
6 endangered species, in any consultation or reconsultation on the  
7 coordinated operations of the Central Valley Project and the State  
8 Water Project, the Secretaries of the Interior and Commerce shall  
9 ensure that any public water agency that contracts for the delivery  
10 of water from the Central Valley Project or the State Water Project  
11 that so requests shall—

12           (1) have routine and continuing opportunities to discuss and submit  
13 information to the action agency for consideration during the  
14 development of any biological assessment;

15           (2) be informed by the action agency of the schedule for preparation  
16 of a biological assessment;

17           (3) be informed by the consulting agency, the U.S. Fish and  
18 Wildlife Service or the National Marine Fisheries Service, of the  
19 schedule for preparation of the biological opinion at such time as  
20 the biological assessment is submitted to the consulting agency by  
21 the action agency;

22           (4) receive a copy of any draft biological opinion and have the  
23 opportunity to review that document and provide comment to the  
24 consulting agency through the action agency, which comments will  
25 be afforded due consideration during the consultation;

26           (5) have the opportunity to confer with the action agency and  
27 applicant, if any, about reasonable and prudent alternatives prior to  
28 the action agency or applicant identifying one or more reasonable  
29 and prudent alternatives for consideration by the consulting agency;  
30 and

31           (6) where the consulting agency suggests a reasonable and prudent  
32 alternative be informed—

33                           (A) how each component of the alternative will contribute to  
34 avoiding jeopardy or adverse modification of critical habitat  
35 and the scientific data or information that supports each  
36 component of the alternative; and

37                           (B) why other proposed alternative actions that would have  
38 fewer adverse water supply and economic impacts are  
39 inadequate to avoid jeopardy or adverse modification of  
40 critical habitat

41           Pub. L. No. 114-322, § 4004 (2016).

42           //////

1        The plain language of § 4004 does apply to the present circumstances. The procedural  
2 requirements set forth in § 4004(a)(1)–(6) apply only to the circumstances set forth in the opening  
3 paragraph, which is specifically limited to “any consultation or reconsultation on the coordinated  
4 operations of the Central Valley Project and the State Water Project.” While Federal Defendants  
5 have reinitiated consultation on the challenged biological opinions, that re-consultation process is  
6 just beginning. The presentation of the IOP to this court is a separate (but related) litigation  
7 procedure meant to bridge the gap between the 2019 biological opinions and any revised  
8 biological opinions that may result from re-consultation. In addition, the absence of finality  
9 discussed above arguably dooms SWC’s proposed WIIN Act cross-claim as well. Just like  
10 NEPA, the WIIN Act does not contain a citizen suit provision, and therefore any claims brought  
11 thereunder are subject to the APA’s threshold requirements. Without a final agency action, any  
12 violations of the procedural requirements set forth in § 4004 are not actionable or justiciable.

13        Having found amendment to assert each one of the proposed cross-claims to be obviously  
14 futile, the court will deny SWC’s motions to amend its answers without prejudice to renewal of  
15 its motion to amend should circumstances change in the future.

16        The court pauses briefly to note that SWC’s motion to amend appears to have been filed at  
17 least in part to obliquely address other, related matters. SWC and other defendant intervenors  
18 have elsewhere questioned whether the court may approve a set of interim injunctive relief  
19 measures such as those proposed in the IOP where the proposing agency has not subjected those  
20 measures to normal environmental review and/or administrative process. (See Doc. No. 26 at 9,  
21 15 (citing *Conservation Nw. v. Sherman*, 715 F.3d 1181, 1185 (9th Cir. 2013) (“[A] district court  
22 may not approve a consent decree that ‘conflicts with or violates’ an applicable statute[.]”)).  
23 Although the court has not examined this potential issue in detail at this stage of the litigation, it  
24 is far from clear that this suggested line of reasoning can, in fact, swim. *See Turtle Island  
25 Restoration Network v. U.S. Dep’t of Commerce*, 672 F.3d 1160, 1167 (9th Cir. 2012) (approving  
26 a consent decree despite noncompliance with statutory rulemaking procedural requirements  
27 because the decree “merely temporarily restore[d] the *status quo ante* pending new agency action  
28 and [did] not promulgate a new substantive rule.”); *see also Nat’l Tr. for Historic Pres. v. Suazo*,

1 No. CV-13-01973-PHX-DGC, 2015 WL 3613850, at \*4 (D. Ariz. June 9, 2015) (holding that  
2 while certain statutes may limit an agency's authority to amend or issue a plan "they do not  
3 preclude the Court from enjoining activities").

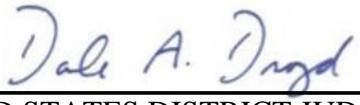
4 SWC seems particularly concerned about two things. First, SWC has apparently received  
5 some indication that Federal Defendants will object to SWC raising an argument based on  
6 *Sherman* in the absence of a pleading setting forth underlying statutory violations. The possibility  
7 of such an objection has no bearing on the court's analysis of the futility of the proposed  
8 amendment.<sup>5</sup> Second, SWC notes, correctly, that it is currently subject to a combined page limit  
9 alongside the other defendant-intervenors. (See Doc. Nos. 311-1 at 11, 315.) To the extent SWC  
10 was attempting to use cross-claims as an end-run around the court's page limits, this again has no  
11 bearing on the court's futility analysis. Put simply, a motion to amend an answer that proposes to  
12 add futile claims is not an appropriate (or effective) mechanism to address a parties' concerns  
13 about briefing page limitations imposed by the court. If the parties wish to present an appropriate  
14 stipulation to the court on this issue, a modest expansion of the page limits will be entertained to  
15 permit the filing of appropriate briefing addressing the court's equitable authority. If no  
16 agreement can be reached, the court will entertain a concise petition for expanded page limits.  
17 The parties are forewarned, however, that the court does not—at least at this point—believe it is  
18 necessary for SWC to exhaustively brief the merits of its arguments as to why or in what way the  
19 Federal Defendants' have violated NEPA, the ESA, or the WIIN Act by proposing the IOP to the  
20 court for approval.

21 **CONCLUSION AND ORDER**

22 For the reasons set forth above, the pending motions for leave to amend (*PCFFA*, Doc.  
23 No. 311; *CNRA*, Doc. No. 215) are DENIED WITHOUT PREJUDICE.

24 IT IS SO ORDERED.

25 Dated: December 7, 2021

  
26 UNITED STATES DISTRICT JUDGE

27  
28 <sup>5</sup> The court does note that the concept of judicial estoppel may prevent the Federal Defendants  
from advancing certain objections.